STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM P WERNETTE and THERESA WERNETTE, Plaintiffs-Appellees, v PAYTON CLARK, Defendant-Appellant.	UNPUBLISHED November 21, 2013 No. 310570 Livingston Circuit Court LC No. 11-025731-CH

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

This case involves claims of acquiescence and trespass in regard to a boundary line dispute between adjacent lakefront residential properties located at 3746 Noble Road, owned by plaintiffs, and 3750 Noble Road, owned by defendant, on Crooked Lake in Brighton, Michigan. This matter proceeded to a bench trial, and defendant appeals as of right a judgment in favor of plaintiff, in which the trial court found that plaintiffs' and defendant's predecessors in title had acquiesced to a boundary line other than the undisputed survey line for the required statutory period. Defendant raises several arguments on appeal: the trial court erred by (1) excluding testimony of a late discovered predecessor in title, precluding defendant from presenting judicial estoppel evidence, and precluding defendant from offering evidence of plaintiffs' unclean hands, and (2) finding that there was a historical boundary line established by acquiescence. We affirm.

I. FACTUAL BACKGROUND

The properties are bordered by Noble Road to the north and Crooked Lake to the south. Plaintiffs purchased their home in 1993. Prior to plaintiffs' ownership, James Elliot Sr. and Shirley Elliot owned the property from 1958 to 1993. Defendant purchased his home in 2008. Prior to defendant's ownership, Dennis O'Malley owned the property from 2003 to 2007, and before O'Malley, Dave and Tina Ikon owned the home, preceded by other owners.

There are two potential property lines at issue in this case, and several physical markers help identify these lines. Moving from north to south along the border between the properties are the following physical markers: a wood retaining wall in the front yard, which runs north and south (wood retaining wall); a stone retaining wall, which runs east and west and in front of plaintiffs' deck (north stone retaining wall); a two-level deck on plaintiffs' property; a garage on defendant's property, which is adjacent to the northern half of plaintiffs' deck; a vertical wood

retaining wall that creates a two to three foot dropoff, which runs east and west and lines up with the southern end of defendant's deck (vertical wood retaining wall); a cinderblock wall, which runs north and south and is between defendant's yard and the southern half of plaintiffs' deck; another stone retaining wall, which runs east and west and underneath plaintiffs' deck (south stone retaining wall); and a large tree that sits south east of the south east corner of defendant's deck. The cinderblock wall intersected with the vertical wood retaining wall. The cinderblock wall did not extend all the way down to the lake. Defendant has removed the first two rows of cinderblock and placed landscaping blocks on top of the foundation that remained. The parties stipulated to the fact that defendant's garage, which was built in 1979, was built before plaintiffs' deck. According to defendant, the wood retaining wall was put in at the same time as defendant's garage.

The first potential property line is the stipulated "survey line," based on several surveys performed over the years that are in agreement. The side of defendant's garage is 2.9 feet from the survey line. The northern half of plaintiffs' deck is 0.3 feet from the survey line, and the southern end of the deck encroaches over the line by 0.5 feet. In the southern half of the property, defendant's sprinkler line encroaches over the line by about a foot, plus or minus, and the base area of a rock shoreline encroaches over the line by two feet, plus or minus. The subdivision was originally platted in 1918, and there are no bearings for the lot lines inside the subdivision. The surveyor was not able to find any evidence that bearings had been set on the property prior to 1998.

The second potential property line is the alleged "historical boundary line," which is marked by several physical markers: the wood retaining wall, the east end of the stone retaining walls, the cinderblock wall, and the tree. The end of the stone retaining walls lined up with the cinderblock wall and wood retaining wall. The most recent surveyor was able to mark the approximate location of the cinderblock wall, a portion of which defendant has removed, and other retaining walls from pictures, and he provided a proposed revised boundary line based on historical markers, such as the remaining portions of the retaining walls, and photographic evidence.

The parties agree that the survey line is the property line in the southern half of the property. The disputed area is the front yard and the area along the side of plaintiffs' deck and continuing down to the tree. The parties agree that defendant's sprinkler lines encroach over the property line and onto plaintiffs' property. Therefore, the issue at trial came down to which line, the survey line or the alleged historical boundary line, constituted the property line given the doctrine of acquiescence and the historical occupation of the properties.

A. HISTORICAL OCCUPATION OF PLAINTIFFS' AND DEFENDANT'S PROPERTIES

James Elliot Jr. testified on behalf of plaintiffs at trial, and because his parents, James Sr. and Shirley, were the previous owners of plaintiffs' property, he was able to provide testimony regarding his family's occupation of the property during their ownership. The Elliot family spent summer weekends at the property. Elliot Jr. recalled that his family would park their cars up to the north stone retaining wall. Elliot Jr. usually cut the grass on his parents' property and helped maintain the yard, and his family maintained the property on the west side of the cinder block wall and wood retaining wall, using these physical markers as boundaries. As Elliot Jr.

understood it, his parents' property continued eastward about one lawnmower length from the side of their deck up to the tree. Elliot Jr. was not aware of any agreement about a historical boundary line, and he always assumed that he was on his parents' property when he stayed to the west of the cinderblock wall. No one ever challenged this assumption. Elliot Jr. recalled that he and his father put in a vertical wood retaining wall that abutted the cinderblock wall to hold back dirt. Elliot Jr. saw a picture at trial of work defendant completed near plaintiffs' deck and around a tree near the survey line, and Elliot Jr. testified that the paver blocks and bushes were sitting on land that he used to maintain and considered part of his parents' property.

Dennis O'Malley testified on behalf of defendant, providing testimony regarding his occupation of what is now defendant's property from 2003 to 2007. According to O'Malley, he honored the survey line as the legal boundary, and plaintiffs never claimed that there was a historical boundary line different from the survey line. O'Malley was made aware that plaintiffs' deck overhung the survey line when he purchased the property and was required to sign some paperwork in this regard. The only boundary dispute O'Malley had with plaintiffs was in regard to a 20-foot area along the property line beginning at the waterline; plaintiffs would mow onto O'Malley's property. William would "try to get everybody ticked off . . ." with his lawn mowing and would "cut a path through everybody's yard[,]" but the problem ended when one of the neighbors installed a fence, preventing William from coming onto the neighbor's property. O'Malley put down sections of an old wood dock in the three-foot space between the deck and the garage, on what he believed was his property, to prevent the area from becoming muddy. O'Malley used this portion of the property as his own, and plaintiffs never objected. According to O'Malley, no flowers were planted alongside the deck. However, O'Malley testified that plaintiffs always maintained the grass on the west side of the wood retaining wall.

Plaintiffs, Theresa and William Wernette, both testified at trial regarding their occupation of their property from 1993 to the present. Plaintiffs received a mortgage survey when they purchased their home, which did not indicate that their deck encroached over the survey line, and they were not otherwise aware of the encroachment. However, as a result of an unrelated boundary dispute, plaintiffs had their property surveyed in 1998. Plaintiffs discovered that according to the survey line, which differed from their mortgage survey, their deck encroached onto the neighboring property. Despite these survey results, plaintiffs continued to occupy the property in the same manner. According to plaintiffs, the proposed property line included on the survey submitted as an exhibit at trial matches their mortgage survey.

When plaintiffs purchased their property, the area between the deck and the garage was dirt. Theresa testified that defendant and his predecessors did not use that area to access the lake because there was a drop off, presumably due to the vertical wood retaining wall. Additionally, the owners previous to plaintiffs had placed planters with geraniums on the wood retaining wall and the cinderblock wall. While there were no plants in the area between plaintiffs' garage and defendant's deck, plaintiffs grew hostas on the east side of the southern half of their deck.

Plaintiffs understood that the wood retaining wall constituted the border when they purchased the home, and plaintiffs maintained that whole section of lawn until defendant began his project in 2010. Plaintiffs maintained roughly one lawnmower's length beyond the line of their deck up to the cinderblock wall, which they believed marked the boundary, and would sometimes mow beyond this line to be neighborly. Plaintiffs believed the property line extended

down from the cinderblock wall to the base of the tree. Before O'Malley owned defendant's property, the property was owned by the Ikons. The Ikons leaned old wood dock sections up against their garage, but plaintiffs could still access and maintain the area near their deck. Plaintiffs did not have a problem with O'Malley laying the dock sections down when he purchased the property because it prevented mud and allowed them to continue accessing and using that area. O'Malley never discussed his use of that area with plaintiffs. Plaintiffs agreed that the only boundary dispute they had with O'Malley was with regard to the property line near the lake.

According to defendant, he knew nothing of any claim that there was a historical boundary line or that the cinderblock wall was the boundary prior to being served with the complaint; the only line discussed was the survey line. Defendant testified that there were no flowers along plaintiffs' deck when he moved in. Similarly, Deborah Smith, who did some planting projects for defendant in 2010, also testified that there were no plants along plaintiffs' deck. According to defendant, plaintiffs never complained about their flowers being disturbed by defendant's landscaping work. When asked whether William ever claimed "that there was a property line different than the survey line that was four or four and half inches onto [defendant's] side of the survey line that was designated by the end of a retaining wall[,]" defendant responded, "Never. Only that I cut off the end of their wall."

B. PRESENT BORDER DISPUTE

The present dispute arose in spring 2010 when defendant approached plaintiffs about his proposed plans for landscaping improvements, which plaintiffs opposed. According to plaintiffs, they explained to defendant that the project would require a variance and they would be objecting because there was not enough room to complete the project. William believed the project would not only cross the historical boundary line, but the survey line as well. Defendant proceeded with his project.

According to defendant, plaintiffs told defendant they did not want him walking in the area between their deck and his garage because it was too close to their deck. Defendant told William that he never would have bought the property if he thought he could not access the lake from the front of his property. Defendant went forward with excavation. During this time, defendant offered to fill and raise the grade of a soggy portion of plaintiffs' property near the lake, and plaintiffs accepted. Defendant offered to lay sod for plaintiffs in the newly graded area, but plaintiffs denied the offer, believing defendant had not properly graded the area. Despite defendant adding soil to the soggy area on plaintiffs' property near the lake, plaintiffs continued to have issues with water pooling in this area after defendant completed his project, and they filled the area with additional soil from their property to resolve the issue.

Defendant next had a sprinkler system installed. According to defendant, around this time William admitted that his deck overhung the property line. Defendant staked out the survey line in the area where the sprinkler system was to be installed, but plaintiffs alleged it was incorrect. A survey was performed and showed the staked line was incorrect. Plaintiffs also challenged the location of the line in another area on the day it was installed. Defendant offered to move the line, but after some back and forth, William ultimately told defendant not to move it. Brandon Finch, who installed the sprinkler system for defendant, indicated that William became

"aggravated with the work[er] and actually got right in his face and was pretty adamant about him removing himself from the property at that moment." At trial, defendant testified that he would still be glad to move the line if plaintiffs wished.

After the sprinkler controversy, defendant had another survey performed, and there was no change from the previous surveyor's pins. The surveyor placed wood stakes with pink ribbons to mark the boundary. One morning, defendant noticed vandalism to his construction site, causing damage and delay. That same morning, he also noticed that the surveyor stakes had been removed. After this incident, defendant had the surveyor insert surveyor pins that legally cannot be removed. William admitted that upon coming home to find his retaining walls removed, his magnetic survey nail removed, and new survey stakes and ribbons placed on his property, he removed these stakes because he was upset about defendant's continued trespass onto his property.

In July 2010, plaintiffs became more assertive with their disapproval when one of defendant's workers began cutting the south stone retaining wall. Theresa instructed the worker to stop cutting the wall, and defendant began yelling at her and telling her it was his property. Theresa told defendant that it was her retaining wall and that it was grandfathered in. The police were called to intervene. According to defendant, he cut roughly four inches off the end of both stone retaining walls—the portion that was on his side of the survey line. At the suggestion of the officer, defendant stopped work and consulted the building inspector to ensure that everything was in order before proceeding.

Plaintiffs sent an email to Adam Van Tassell, the Genoa Township code enforcement officer who enforces township ordinances and who approved defendant's plans, to make him aware of their objection to defendant's action of cutting the retaining walls and to seek his intervention. In the email, plaintiffs referred to the stone retaining walls as being "grandfathered" in, as opposed to referring to a "historical line" because they were unfamiliar with that terminology. However, according to defendant, nothing in plaintiffs' email to Van Tassell indicated that plaintiffs claimed there was a historical property line.

Van Tassell testified that he received plaintiffs' email complaint, came out to the properties, and concluded that there was no violation of township ordinances. Van Tassell testified that the township does not have restrictions on landscaping, including brick pavers; property owners can put brick pavers up to the property line. Van Tassell did not recall hearing about a historical boundary line, but he remembered there was a difference of opinion regarding where the survey line was located. After Van Tassell and other inspectors approved the project, defendant continued his work.

In August 2010, there was an incident involving William and Gerald Clark, who assisted defendant with his project. Gerald recalled the incident as follows:

> *Gerald.* So I put my hand on [William's deck] rail, he had a major objection to me touching his rail and at that point it just really escalated into a pretty ugly scene and, you know—
>
> *The Court.* All right. That's—

Gerald. I don't know how much more you need to know.

The Court. That's enough.

Gerald. But it got much worse.

The Court. Yeah, that's enough on that. The point is made.

Gerald stopped working on the project because he "[f]ear[ed] for [his] life." Gerald heard about the alleged historical property line for the first time at trial. According to Gerald, plaintiffs knew that their deck was old, not up to code, and overhung the property line, and they were planning to address these issues.

Plaintiffs are concerned that defendant's project has changed the grade of defendant's property, caused changes in the direction of the water runoff onto their property, and caused erosion problems on their property. Plaintiffs are also concerned that the proximity of defendant's paver staircase to their deck will prevent them from being able to maintain their deck, or access an underground electrical line alongside plaintiffs' deck, which supplies electricity to plaintiffs' garage.

C. PROCEDURAL HISTORY

Plaintiffs filed their complaint on January 4, 2011, alleging acquiescence to a historical boundary line and trespass. Plaintiffs requested various amounts of damages for repairs and attorney fees in the sum of $25,000. Defendant answered, denying acquiescence, maintaining that the survey line is the proper boundary line, and asserting several affirmative defenses, including unclean hands. A preliminary injunction was issued on June 20, 2011, enjoining both parties from engaging in construction within two feet of the surveyed property line. Defendant filed a motion for summary disposition on November 3, 2011, and this motion was denied. Plaintiffs filed a motion in limine seeking to exclude testimony about criminal proceedings that were pending against William and about other property line disputes between plaintiffs and other neighbors. The trial court broadly ordered "that irrelevant evidence shall not be allowed and the parties shall direct themselves to proving the factual issues to be determined in this matter as set forth in the Complaint." The matter was ultimately tried as a bench trial before Judge Stanley J. Latreille, a visiting judge,[1] on May 21, 22, and 23, 2012. In the court's final order, the court found in plaintiffs' favor:

> A historical boundary was established by acquiescence between the property owned by the Plaintiffs and the Defendant that was adhered to and honored by the Plaintiffs and the Defendant's respective predecessors for more than fifteen years, marked by a cinder block retaining wall that was located between the properties.

[1] Judge Michael P. Hatty presided over all of the preliminary hearings leading up to trial, including the Motion in Limine hearing held on January 12, 2012.

The court concluded that:

> The legal boundary between the property owned by the Plaintiffs and the Defendant shall be the location of the original cinder block retaining wall that existed on the boundary between the properties, as depicted on the survey by Jack Smith dated February 23, 2012 the ("Survey"), as the Proposed Revised Boundary Line.

Unsatisfied with the court's decision, defendant filed a claim of appeal on July 7, 2012. Defendant also filed a motion for stay pending appeal on July 18, 2012, and the motion was granted, as stipulated to by the parties. In addition, the preliminary injunction was terminated, and a revised order for preliminary injunction was issued on July 27, 2012, which enjoined further construction, but allowed, among other things, reinstallation of the wood retaining wall to restore the grade and prevent further erosion. On August 29, 2012, plaintiffs moved for a show cause order to require defendant to show cause why he should not be held in contempt for refusing to allow plaintiffs to complete the reinstallation of the wood retaining wall in violation of the court's order. Following a hearing, the court ordered that plaintiffs be allowed to reinstall the wood retaining wall pursuant to the revised order for preliminary injunction.

II. LEGAL ANALYSIS

A. EXCLUSION OF EVIDENCE

This Court reviews a trial court's decision to exclude evidence, including undisclosed witnesses, for an abuse of discretion. *Howard v Kowalski*, 296 Mich App 664, 675; 823 NW2d 302 (2012), lv gtd __ Mich __; __ NW2d __ (2013); *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 90; 618 NW2d 66 (2000). "An abuse of discretion exists when the trial court's decision falls outside the range of principled outcomes." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 162; 792 NW2d 749 (2010). "In civil cases, evidentiary error is considered harmless unless declining to grant a new trial, set aside a verdict, or vacate, modify, or otherwise disturb a judgment or order appears to the court inconsistent with substantial justice." *Guerrero v Smith*, 280 Mich App 647, 655; 761 NW2d 723 (2008) (quotation marks and citation omitted). "[I]n order to preserve the issue of the admissibility of evidence for appeal, the proponent of evidence excluded by the trial court must make an offer of proof." *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 291; 730 NW2d 523 (2006).

Pursuant to MRE 402, "'[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court.'" *Waknin v Chamberlain*, 467 Mich 329, 333; 653 NW2d 176 (2002), quoting MRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

1. EXCLUSION OF PREDECESSOR IN TITLE'S TESTIMONY

Defendant argues that the trial court abused its discretion when it excluded Caryn Bennett's testimony, a predecessor in title who was not on the witness list, yet allowed plaintiffs' witness, James Elliot Jr., to testify, of whom defendant contends he was not given proper notice

because defendant assumed the "James Elliot" listed on plaintiffs' witness list referred to the deceased James Elliot Sr. Defendant explains that Bennett's testimony would have rebutted Elliot Jr.'s testimony through her testimony regarding her historical occupation of defendant's property as predecessor in title and could have laid a foundation for additional photographic evidence. Alternatively, defendant argues that if the trial court properly excluded Bennett from testifying, the trial court erred by permitting Elliot Jr. to testify.

MCR 2.401(I)(1) requires parties to file and serve a list of lay and expert witnesses within the time directed by the court. MCR 2.401(I)(2) provides, "The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." The decision whether to permit or exclude witnesses is within the trial court's discretion. See *Duray Dev, LLC*, 288 Mich App at 162-165. "Trial courts should not be reluctant to allow unlisted witnesses to testify when the interest of justice so requires. This is especially so with regard to rebuttal witnesses." *Elmore v Ellis*, 115 Mich App 609, 613-614; 321 NW2d 744 (1982).

Exclusion of witnesses is a potential sanction for a party's failure to timely file a witness list. *Duray Dev, LLC*, 288 Mich App at 164. Trial courts are permitted to employ this sanction, even in circumstances where such a sanction "is equivalent to a dismissal"; however, the trial court is required to consider the specific circumstances of the case to determine whether such a sanction is appropriate. *Id.* at 164-165. This Court has established a non-exhaustive list of factors to be considered for "determining the appropriate sanction" for failure to file a timely witness list:

> (1) whether the violation was wil[l]ful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect[;] and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive. [*Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990) (footnotes omitted).]

In the present case, defendant did file a witness list, but neither the name "Caryn" nor "Bennett" appeared on his list. However, the witness list stated, "Defendant reserves the right to call additional witnesses as discovery may reveal. Defendant reserves the right to call any and all necessary *rebuttal* witnesses." (Emphasis added.)

At trial, defendant attempted to call Bennett as a rebuttal witness, indicating that she would testify that (1) the garage was built to allow for a three-foot variance from the property line and (2) there were no concerns regarding a historical boundary line during construction of the garage, and defendant attempted to present new photographs for which Bennett would lay the foundation. Plaintiffs' counsel first learned of the new witness at the end of the previous day of trial and was handed the new photographs the next morning of trial. Defense counsel explained that he had been unprepared for Elliot Jr. to testify the previous day; however, he was able to

locate a previous owner of defendant's property, despite some prior confusion about her name. The trial court questioned defense counsel's claim that he was unprepared for Elliot Jr.'s testimony, indicating that because counsel knew Elliot Sr. was deceased, he should have known Elliot Jr. was the intended witness. Defense counsel explained that he was unaware that an Elliot Jr. existed, and it never occurred to him to look for such an individual because several individuals on the witness list were deceased. Plaintiffs' counsel countered that defendant's claim that he was unaware of Elliot Jr. was disingenuous because plaintiffs' counsel had made references about him before trial.

After further argument presented by counsel for both parties, the trial court addressed the *Dean* factors and ruled that the witness be excluded. In addressing whether the violation was willful or accidental, the trial court discussed the fact that there was no discovery done in the present case, which the court indicated was an important factor, and indicated that had an adequate investigation occurred, Bennett could have been found earlier. Regarding the factor of prejudice to defendant, the trial court concluded that given the time frame of Bennett's ownership, the court was not convinced that this was an important witness for the defense. Regarding the factor of actual notice, the trial court concluded that because plaintiffs were given notice late the previous day about this witness, it did not "seem particularly fair . . ." to the trial court. The trial court also indicated that allowing this witness would lead to rebuttal witnesses being called and further delay. Regarding the factor of an attempt to timely cure the defect, the trial court stated that he had no indication that there had been a private detective looking for more witnesses or that any other strenuous investigative efforts were going on. Regarding the factor of whether there is a lesser sanction that would better serve the interests of justice, the trial court concluded that he was not aware of a lesser sanction because this case involves excluding a witness, not dismissing a case. The court concluded that the remaining factors were inapplicable.

Defendant contends that the trial court inappropriately relied on the *Dean* factors to resolve this issue because *Dean* involved a failure to file any witness list at all, not merely the omission of a witness from the filed list. The *Dean* factors are typically discussed in situations in which exclusion of a witness occurs as a discovery sanction when counsel has failed to timely file a witness list. See *Duray Dev, LLC*, 288 Mich App at 162-166; *Dean*, 182 Mich App at 32-34. We are not convinced that this distinction renders the *Dean* factors entirely inappropriate for determining whether exclusion of a late-noticed witness is appropriate such that the trial court's reliance on these factors constitutes an error.

The *Dean* factors are intended to determine the appropriate sanction for failure to file a witness list; in such circumstances, exclusion of witnesses can result in or have the effect of a dismissal of an action. *Dean*, 182 Mich App at 32. However, under the present facts, exclusion of Bennett was not as severe a sanction as exclusion of a witness is in circumstances in which a party fails to file any witness list at all because, in this case, defendant had other witnesses who testified on his behalf and exclusion of Bennett did not have the effect of a dismissal. Therefore, if anything, the trial court unnecessarily took the extra step of addressing the *Dean* factors; however, the trial court's discussion of the factors provided a thorough discussion of the court's rationale for excluding Bennett's testimony. We cannot conclude that the trial court's reliance on the *Dean* factors constituted an error.

While trial courts should permit unlisted witnesses "when the interest of justice so requires," particularly in the case of rebuttal witnesses, this was not such a situation. *Elmore*, 115 Mich App at 613-614. The fact that Bennett was a predecessor in title who could have provided testimony regarding her occupation of defendant's property during her ownership demonstrates that defendant should have been able to locate Bennett prior to trial and list her as a witness. Given that the parties could have, but chose not to, engage in discovery that would have revealed information about Bennett, we cannot conclude that the trial court abused its discretion in excluding Bennett's testimony.

Moreover, the trial court explicitly stated while giving its oral ruling at the close of trial that "a boundary line was established by acquiescence of the occupying property owners by at least 1974[,]" "15 years after the Elliots purchased their property." However, Bennett owned the property in the 1980s. Therefore, even if the trial court had abused its discretion in excluding Bennett's testimony, this error would be harmless because the trial court's statement indicates that the 15 years of acquiescence was established before Bennett owned defendant's property.[2]

Defendant relies on *Butt v Giammariner*, 173 Mich App 319, 321-323; 433 NW2d 360 (1988), in which this Court concluded that the trial court's decision to *permit* testimony of a witness not on the party's witness list was proper because the witness could not have been added to the initial witness list. The plaintiff was allowed to voir dire and cross-examine the witness, and the plaintiff was able to testify in rebuttal. *Id.* at 321-322. The witness was going to testify about a videotape he created, but the video was not created until after the first witness list was filed. *Id.* at 322-323. Conversely, in the present case, this Court is reviewing the trial court's decision to *exclude* testimony, and because the witness was a predecessor in title, defendant should have been able to list Bennett on his initial witness list.

Defendant also relies on *Tisbury v Armstrong*, 194 Mich App 19; 486 NW2d 51 (1991). In that case, the plaintiffs were left without an expert witness because the trial court "denied their motion for an adjournment and their motion to amend their witness list." *Id.* at 20. In an offer of proof to demonstrate good cause, the plaintiffs explained that they were told by the witness that he would not testify, but prior to this declaration, the plaintiffs had no indication that he would not testify. *Id.* at 20-21. This Court reversed and remanded, concluding that the plaintiffs provided an adequate explanation for why their witness was not present. *Id.* at 21. In reaching this decision, this Court explained that the original expert witness had not yet been deposed and there was no indication that the plaintiffs had repeatedly postponed trial due to a lack of diligence. *Id.* Importantly, the Court stated that it found "it significant that the court's decision

[2] A court "speaks [only] through its written orders and judgments, not through its oral pronouncements." *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009). While this statement by the trial court was not made within its final order, and instead was made during its oral ruling at trial, this statement provides insight into the court's statements in its order and demonstrates that if exclusion of this evidence was an error, it would have been a harmless one because even if the disputed testimony had been presented, it would not have changed the trial court's ruling.

on plaintiffs' motions put an end to this lawsuit[,]" and given Michigan's policy "favoring the meritorious determination of issues," the Court did not find such a drastic sanction appropriate. *Id.* However, in the present case, exclusion of Bennett did not put an end to trial; defendant was able to put forth other witnesses in his defense. Therefore, the facts of the cases relied on by defendant are inapposite to the facts of the present case.

We further disagree with defendant's assertion that the trial court's exclusion of Bennett's testimony and admission of Elliot Jr.'s testimony constituted an unequal ruling. As the trial court indicated, the circumstances surrounding these two witnesses were not equivalent. A "James Elliot" was listed on plaintiffs' witness list, and defendant knew that James Elliot Sr. was deceased. However, there was no individual listed by either the name "Caryn" or "Bennett" on defendant's witness list. Assuming defendant was truly confused regarding the identity of the listed "James Elliot," minimal discovery would have alerted defendant to Elliot Jr.'s existence. Therefore, we cannot conclude that the trial court erred in ruling differently regarding these two witnesses.

2. EXCLUSION OF JUDICIAL ESTOPPEL EVIDENCE

Defendant argues that the trial court erred[3] by not allowing defendant to present evidence of William's statements at William's criminal trial, which defendant contends were inconsistent with statements William made in the present matter and could have been used as an estoppel to the positions William took during his testimony. Defendant also seems to assert that the email plaintiffs wrote to Van Tassell, which was admitted at trial, also demonstrates that plaintiffs' position at trial was inconsistent with the position plaintiffs took with the township.

"Judicial estoppel is an equitable doctrine[,]" and this Court reviews the applicability of the doctrine de novo. *Szyszlo v Akowitz*, 296 Mich App 40, 46; 818 NW2d 424 (2012). Judicial estoppel applies when a party "successfully and unequivocally asserted a position in a prior proceeding that is wholly inconsistent with the position now taken." *Szyszlo*, 296 Mich App at 51 (quotation marks and citation omitted). The conflicting positions must be within "the *same or related* litigation." *Wolverine Power Supply Coop v DEQ*, 285 Mich App 548, 567; 777 NW2d 1 (2009) (quotation marks and citation omitted).

Defense counsel questioned William regarding a portion of testimony that William gave in 2010 in which he responded affirmatively when asked whether he was happy with defendant's project. The trial court indicated that he did not "care whether he was unhappy or happy at another time." The trial court further indicated that the question in this case is where the boundary line is located, and William's criminal proceeding testimony would only be relevant if it provided information about who maintained the portion of the property in question or whether William considered that portion of property to be defendant's property. The trial court then directed defense counsel to move on. Defense counsel did not attempt to make an offer of proof

[3] We note that defendant failed to apply the appropriate standard of review—abuse of discretion—in his analysis of this issue, and instead, defendant merely argued that the trial court "reversibly erred."

regarding how this evidence would demonstrate that the doctrine of judicial estoppel applied; instead, counsel replied, "Very good, Judge."

There are several preservation hurdles to our reviewing this argument. First, defendant failed to raise the issue of judicial estoppel before the trial court or assert it as an affirmative defense; therefore, the underlying issue of judicial estoppel was not properly preserved for appellate review. See MCR 2.111(F)(3)(a); *Driver v Hanley (After Remand)*, 226 Mich App 558, 563-564; 575 NW2d 31 (1997). Instead, defense counsel merely indicated at trial that he was questioning William about his prior testimony for impeachment purposes.

Second, defendant also fails to provide any argument on appeal regarding what statements made by William at trial would have been contradicted by William's former testimony at his criminal trial such that the doctrine of judicial estoppel would apply. Defendant merely asserts that *if* William's testimony at trial *had* contradicted his testimony in the present matter, it *could* have constituted grounds to assert judicial estoppel. Defendant's argument, thus, amounts to mere speculation that William's testimony at his criminal trial would have been wholly inconsistent with the position William took in the present litigation; therefore, defendant has failed to prove as much. *Szyszlo*, 296 Mich App at 51.

Third, defense counsel failed at trial to offer any proof that the testimony regarding William's former testimony that he was attempting to elicit would provide such relevant information. To explain this failure, defendant states in his reply brief on appeal, "When the trial court repeatedly says 'move on,' . . . no counsel, even if it is a less rigid jurist behind the bench, is apt to keep trying to make a record when the trial court has already closed the door to same." While defense counsel may well have felt intimidated by the trial judge, this is no excuse for counsel's failure to make an adequate record in order to preserve this issue for appellate review. Defendant's failure to preserve this issue prevents this Court from being able "to determine whether the trial court erroneously excluded [the] testimony . . . ." *Detroit Plaza Ltd Partnership*, 273 Mich App at 291-292.[4]

The trial court did not abuse its discretion in directing defense counsel to move on when counsel was questioning William about his prior criminal proceeding testimony because (1) the court explained under what circumstances evidence of William's prior testimony would be relevant to determination of facts of consequence in the present proceedings, and (2) defense counsel did not provide an offer of proof to demonstrate that the testimony he sought to elicit regarding William's prior testimony was relevant to the boundary dispute or otherwise attempt to argue that the doctrine of judicial estoppel applied in light of William's criminal proceeding testimony.

[4] Further, defendant fails to argue why plaintiffs' email to Van Tassell is inconsistent with his position on appeal. Given that the email seems to have been written before defendant progressed very far into his project and given that plaintiffs indicated in the email that the stone retaining walls belonged to plaintiffs and were "grandfathered," plaintiffs' position in the email appears to be consistent, rather than wholly inconsistent, with plaintiffs' position at trial.

3. EXCLUSION OF UNCLEAN HANDS EVIDENCE

In a somewhat related argument, defendant argues that the trial court erred[5] by preventing him from presenting relevant evidence of plaintiffs' unclean hands at trial, specifically evidence of William's criminal conviction for assaulting Gerald Clark and evidence that plaintiffs had boundary disputes with other neighbors.

This Court reviews a trial court's decision regarding the doctrine of unclean hands de novo. *Attorney General v Ankersen*, 148 Mich App 524, 545; 385 NW2d 658 (1986). Actions to quite title are equitable actions. *Richards v Tibaldi*, 272 Mich App 522, 537; 726 NW2d 770 (2006). "It is well settled that one who seeks equitable relief must do so with clean hands." *Attorney General v PowerPick Club*, 287 Mich App 13, 52; 783 NW2d 515 (2010). "The clean-hands doctrine closes the doors of equity to one tainted with inequitableness or bad faith relative to the matter in which he or she seeks relief, regardless of the improper behavior of the defendant." *Richards*, 272 Mich App at 537. However, for the unclean-hands doctrine to apply, the misconduct "'must bear a more or less direct relation to the transaction concerning which complaint is made.'" *McFerren v B & B Investment Group*, 253 Mich App 517, 524; 655 NW2d 779 (2002), quoting *McKeighan v Citizens Commercial & Savings Bank of Flint*, 302 Mich 666, 671; 5 NW2d 524 (1942). Further, a claim for equitable relief is not denied under the unclean-hands doctrine "'merely because of the general morals, character[,] or conduct of the party seeking relief.'" *Id.*, quoting *McKeighan*, 302 Mich at 671.

Defendant raised unclean hands as an affirmative defense. The evidence in support of this defense was the focus of plaintiffs' motion in limine, in which defendant argued that the evidence of William's criminal incident and evidence regarding other neighbors with whom plaintiffs had boundary disputes, with regard to unrelated boundaries, would allow defendant to demonstrate that William "manufacture[d] a historic[al] boundary [dispute] where none existed in order to vindicate himself and to give [defendant] pure grief." During the motion hearing, the trial court emphasized that, at trial, the parties should focus on evidence that will resolve the boundary dispute as alleged in the complaint, and not on what was motivating any particular party. The point was made by the court during defense counsel's opening statement, where the trial court stated:

> All right. Let me just interrupt you for a minute here. One thing to keep in mind, and maybe this is for me, a nice aspect of this case is people's motivations, you know, and whether somebody was angry, obnoxious, maybe unfair in their attitude, is really irrelevant to this case. I say it's nice for me because I don't have to get into people's motivations. . . . [E]ither we're going to decide the line and then we're going to decide what—what trespasses, if any, there are and what kind of damages there were. So I don't care whether your man is—Mr. Clark is a nice guy or not nor the Wernette's. I don't care if they're nice

[5] Again, defendant failed to apply the appropriate standard of review—abuse of discretion—in his analysis of this issue, and instead, defendant merely argued that the trial court "reversibly erred."

people or not. Now in some cases I have to decide that sort of thing, but not in this case.

Defendant fails to demonstrate that the trial court abused its discretion in denying admission of testimony regarding plaintiffs' disputes with other neighbors related to other boundaries or William's criminal actions. There has been no showing that this evidence would have been relevant to defendant's allegation of unclean hands, namely, that William's actions rendered plaintiffs "tainted with inequitableness or bad faith" in the current proceedings. *Richards*, 272 Mich App at 537. Defendant's argument that counsel created the theory of a historical boundary line out of thin air in response to William's criminal charges resulting from the boundary dispute is disingenuous, given that it is clear that William's conduct, though apparently criminal, was triggered by defendant's conduct on what William believed was his property—property that was within the "historical boundary." Further, plaintiffs' email to Van Tassell indicates that plaintiffs believed the stone retaining walls, the edge of which mark the "historical boundary," belonged to them. While William's conduct was criminal and related to the transaction of defendant's trespass, defendant has failed to demonstrate how William's conduct rendered plaintiffs "tainted with inequitableness or bad faith" in the context of the location of the boundary line. *Richards*, 272 Mich App at 537. Regarding the evidence of plaintiffs' disputes with other neighbors, this evidence would merely have demonstrated general morals or character, which cannot form the basis of an unclean hands defense. *McFerren*, 253 Mich App at 524. Therefore, the trial court did not abuse its discretion by directing the parties to limit their evidence to that which would resolve the boundary dispute.

B. ACQUIESCENCE

Defendant next argues that evidence did not support the trial court's findings that: (1) plaintiffs' deck was built with proper permits and (2) during construction of the deck, parts of the cinderblock wall were removed and the wood retaining wall was replaced. Defendant also argues that even if a boundary was established by acquiescence by 1974, it has been twice abandoned since that time: (1) in 1987 when the garage was built only a few inches from the historical boundary line and the walkway next to the garage came over the survey line by about 18 inches and (2) from 2003 to 2007 when O'Malley placed the wood dock sections down in the walkway, occupying the space between the garage and the survey line. Therefore, defendant contends, plaintiffs have not proven acquiescence for the required statutory period of 15 years.

This Court reviews quiet title actions, which are equitable actions, de novo. *Mason v City of Menominee*, 282 Mich App 525, 527; 766 NW2d 888 (2009). However, a trial court's factual findings "are reviewed for clear error." *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001).

There are three theories of acquiescence: "(1) acquiescence for the statutory period, (2) acquiescence following a dispute and agreement, and (3) acquiescence arising from intention to deed to a marked boundary." *Walters v Snyder*, 239 Mich App 453, 457; 608 NW2d 97 (2000) (*Walters II*). The present dispute involves the theory of acquiescence for a statutory period, which "'requires merely a showing that the parties acquiesced in the line and treated the line as the boundary for the statutory period, irrespective of whether there was a bona fide controversy regarding the boundary.'" *Mason*, 282 Mich App at 529, quoting *Walters v Snyder*, 225 Mich

App 219, 224; 570 NW2d 301 (1997) (*Walters I*). The statutory period for acquiring property by acquiescence is 15 years. MCL 600.5801(4); *Mason*, 282 Mich App at 529. To succeed on a claim of acquiescence, it is "not require[d] that the possession be hostile or without permission as would an adverse possession claim." *Mason*, 282 Mich App at 529. There are no explicitly established elements for acquiescence under Michigan law; however, "caselaw has held that acquiescence is established when a *preponderance* of the evidence 'establishes that the parties *treated* a particular boundary line as the property line.'" *Id.* at 529-530, quoting *Walters II*, 239 Mich App at 458 (emphasis added). "'[W]here the line is acquiesced in for the statutory period it is also fixed.'" *Weisenburger v Kirkwood*, 7 Mich App 283, 289; 151 NW2d 889 (1967), quoting *Hanlon v Ten Hove*, 235 Mich 227, 232; 209 NW 169 (1926) (quotation marks and citations omitted; emphasis removed). As this Court has explained,

> "The law of acquiescence is concerned with a specific application of the statute of limitations to cases of adjoining property owners who are mistaken about where the line between their property is. Adjoining property owners may treat a boundary line, typically a fence, as the property line. If the boundary line is not the recorded property line, this results in one property owner possessing what is actually the other property owner's land. Regardless of the innocent nature of this mistake, the property owner whose land is being possessed by another would have a cause of action against the other property owner to recover possession of the land. After fifteen years, the period for bringing an action would expire. The result is that the property owner of record would no longer be able to enforce his title, and the other property owner would have title by virtue of his possession of the land." [*Sackett v Atyeo*, 217 Mich App 676, 681-682; 552 NW2d 536 (1996), quoting *Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993).]

Moreover, "[a] boundary line having been established by acquiescence, all land within that boundary is included within the original description and passes with a conveyance of the property to which it has become attached." *Escher v Bender*, 338 Mich 1, 6; 61 NW2d 143 (1953). A boundary line established by acquiescence will not be disturbed in the event that a new survey indicates the boundary line is located elsewhere. *Walters II*, 239 Mich App at 458. Additionally, to achieve the statutorily required 15 years of acquiescence, acquiescence by "predecessors in title can be tacked onto plaintiffs' acquiescence of title." *Mason*, 282 Mich App at 530.

At trial, Elliot Jr.'s testimony demonstrated that his family used the property up to the proposed boundary indicated on the survey presented at trial. Elliot Jr. testified that the wood retaining wall in the front yard marked the boundary of the properties, and his family maintained the lawn up to the retaining wall. Elliot Jr. cut the grass on his parents' property and helped maintain the yard, and his family maintained the property on the west side of the cinder block wall. As Elliot Jr. understood it, his parents' property continued eastward about one lawnmower length from the side of their deck up to a tree that was south and east of the deck.

Elliot Jr.'s testimony was supported by Theresa's testimony, who purchased the property from the Elliots. Theresa testified that at the time plaintiffs purchased the property, the Elliots had placed planters with geraniums in them on the wood retaining wall and on the concrete

cinderblock wall between the two properties. Plaintiffs continued to maintain the property up to the cinderblock wall and maintained the front lawn area.

Defendant did not present any evidence to counter Elliot Jr.'s testimony regarding his family's occupation of the land prior to 1974, the year the trial court orally concluded that the historical boundary was established by acquiescence. Therefore, the trial court did not clearly err in finding that plaintiffs had established acquiescence to the historical boundary line for the requisite 15 years by a preponderance of the evidence. *Mason*, 282 Mich App at 529-530. [6]

Finally, we note that throughout his brief defendant asserts that the trial judge arbitrarily established a deadline for the trial based upon his own vacation plans, and defendant "firmly believes" that, as a result, he was denied a fair trial. However, defense counsel admitted that pursuant to MRE 611, the trial court has much discretion to control the course of trial and also acknowledged that he intentionally did not raise this as a separate issue on appeal for this reason. We take this opportunity to note that although our review of the transcripts did reveal that the trial court was concerned with keeping the proceedings timely, the trial judge's conduct constituted "reasonable control" over the proceedings, which was well within his discretion to do.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra

[6] Defendant cites several cases regarding the doctrine of abandonment, none of which are applicable to circumstances when title to property has vested by acquiescence for the requisite statutory period of 15 years. *Van Slooten v Larsen*, 410 Mich 21; 299 NW2d 704 (1980) (abandonment of mineral rights); *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 717; 583 NW2d 232 (1998) (abandonment of a lease hold interest); *Ludington & Northern R v Epworth Assembly*, 188 Mich App 25, 33; 468 NW2d 884 (1991) (abandonment of an easement interest); *Emmons v Easter*, 62 Mich App 226, 237-238; 233 NW2d 239 (1975) (abandonment of personal property). The unpublished case cited by defendant is exactly that—unpublished—and not otherwise factually similar to this case. MCR 7.215(C)(1).